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Utah Supreme Court

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Robert L. Lord; Attorney for Respondents.
Jackson Howard; Howard, Lewis & Petersen; Attorneys for Respondents.

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IN THE SUPREME COURT

OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

J. R. BAGNALL, aka JOSEPH BAGNALL, and FLORENCE BAGNALL, Plaintiffs and Respondents, vs. SUBURBIA LAND COMPANY, an Idaho corporation, et. al., Defendants and Counter-Appellants.	)	Case No. 13753

DEFENDANTS - APPELLANTS BRIEF AND PETITION FOR REHEARING

Appeal from Judgment of the Sixth Judicial District
Court of Sanpete County, State of Utah
Honorable Maurice Harding, Judge

ROBERT L. LORD
118 Metro Building
Salt Lake City, Utah 84111
Attorney for Defendant-Appellants

JACKSON HOWARD, for
HOWARD LEWIS & PETERSON
120 East 300 North
Provo, Utah 84601
Attorneys for Plaintiff-Respondents

FILED

DEC 26 1975

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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Plaintiffs and Respondents,	)	
vs.	)	Case No. 13753
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Attorney for Defendant-Appellants

JACKSON HOWARD, for
HOWARD LEWIS & PETERSON
120 East 300 North
Provo, Utah 84601
Attorneys for Plaintiff-Respondents

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IN THE SUPREME COURT

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vs.	)	Case No. 13753
SUBURBIA LAND COMPANY, an Idaho corporation, et. al.,	)	
Defendants and Counter-Appellants.	)	

APPELLANT'S PETITION FOR REHEARING

Comes now the above named defendants-appellants, Suburbia Land Company of Idaho, Nevada, and Utah, together with the defendant-appellant Lester Romero, and move the Court for a rehearing of the above entitled case by reason of error by the Supreme Court in overlooking and misconstruing material facts and the status of defendants' briefs, basing its decision on incorrect principles of law, overlooking seven critical issues raised by the defendants, overlooking applicable decisions and misapplication of law to the facts and status of the case, all of which materially affected the resulting decision of the Court. The following is a brief statement of the points wherein the Supreme Court is believed to have erred in it's decision (see brief for additional details and explanations):

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POINT I

THE COURT ERRED IN CONCLUDING THAT DEFENDANTS HAD DESIGNATED ONLY THOSE PORTIONS OF THE RECORD FAVORABLE TO THEMSELVES, AND THAT MUCH THAT WAS DESIGNATED WAS CONTROVERTED BY THE UNDESIGNATED PORTIONS.

POINT II

THE COURT ERRED IN CONCLUDING THAT THE DEFENDANTS' BRIEFS WERE LOADED WITH UNREFERENCED, SELF-SERVING STATEMENTS OF FACTS AND CONTENTIONS AND THAT DEFENDANT EXPECTED THE COURT TO CONDUCT THEIR RESEARCH.

POINT III

THE COURT ERRED IN FAILING TO RESPOND TO THE FIRST SIX POINTS RAISED BY DEFENDANTS WHICH POINTS ARE BASICALLY POINTS OF LAW AS APPLIED TO UNCONTROVERTED MATTERS OF FACT.

POINT IV

THE COURT ERRED IN FAILING TO RESPOND TO THE SEVENTH POINT RAISED BY THE DEFENDANTS WHICH POINT WAS A QUESTION OF PROCEDURE AND HAD VERY LITTLE IF ANYTHING TO DO WITH ANYTHING CONTAINED IN THE TRIAL TESTIMONY.

POINT V

APPELLANTS ARE CONSTITUTIONALLY ENTITLED TO A WRITTEN DECISION RESOLVING EACH OF THE POINTS RAISED IN THEIR APPEAL BRIEF AND STATING THE REASONS FOR THAT DECISION.

WHEREFORE, appellants pray for a rehearing of this matter on the merits and upon the grounds stated in appellants appeal brief and reply brief, and for an order reversing the judgment of the trial court, reinstating the contract, and remanding the case for further proceedings consistent therewith.

Respectfully submitted,

ROBERT L. LORD
118 Metro Building
Salt Lake City, Utah 84111
Attorney for Appellants

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IN THE SUPREME COURT

OF THE STATE OF UTAH

J. R. BAGNALL, aka JOSEPH BAGNALL, and FLORENCE BAGNALL,	)	
Plaintiffs and Respondents,	)	
vs.	)	Case No. 13753
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Defendants and Counter-Appellents.	)	

APPELLANT'S BRIEF AND AUTHORITIES IN SUPPORT OF MOTION FOR REHEARING

STATEMENT OF NATURE OF THE CASE

This case involves an action to forfeit a real estate agreement for alleged failure to make the required installments, and to quiet title to some 570 acres of land in the plaintiffs.

DISPOSITION IN THE LOWER COURT

The Court denied the defendants' motion for judgment on the verdict, or, in the alternative, for a new trial, and granted judgment in favor of the plaintiffs, and against the defendants forfeiting the real estate agreement and quieting title in the plaintiss, except for an undivided 1/2 interest in 140.15 acres, which the Court, by Summary Judgment and Decree of Quiet Title,

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awarded to United Paint and Colors. Plaintiff's appeal from the Summary Judgment and Decree of Quiet Title is also pending before this honorable court.

RELIEF SOUGHT ON APPEAL

Appellants (defendants) seek reversal of the Judgment of Forfeiture, and seek to have judgment entered in their favor dismissing the complaint of the plaintiff and reinstating the contract. Defendants further seek an award and judgment for attorney fees and costs, and to have the matter remanded back to the District Court for a determination of damages, adjustments and offsets due defendants from the plaintiffs.

STATEMENT OF FACTS

Appellants incorporate by reference the statement of facts as contained in their original and reply briefs on file herein. The attention of the Court is specifically directed to the Appendix contained in the reply brief which contains extensive references to the record in support of the facts as stated therein.

The exceedingly complex nature of the legal and factual issues involved in this case makes it difficult for counsel to clearly understand, and the writer can well appreciate the difficulty encountered by the members of the Supreme Court in attempting to follow and understand the arguments of appellants as contained in their original and reply briefs on file herein. It appears, however, that the Supreme Court misunderstood the nature of the points of error relief upon by the appellants, and may very well have overlooked appellants restatement of facts which was included in the reply brief as an appendix.

ARGUMENT

POINT I

THE COURT ERRED IN CONCLUDING THAT DEFENDANTS HAD DESIGNATED ONLY THOSE PORTIONS OF THE RECORD FAVORABLE TO

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THEMSELVES, AND THAT MUCH THAT WAS DESIGNATED WAS CONTROVERTED BY THE UNDESIGNATED PORTIONS.

The decision of the Supreme Court herein, filed October 31, 1975, stated that counsel for the defendants had designated only those parts of the record favorable to defendants' position and that much of the designated portion appeared to have been controverted as demonstrated by the trial court's written findings. The decision further stated that practically no references were made to the record to substantiate the factual situation represented by counsel to have existed. As is fully demonstrated in defendants' reply brief, the record before the court is complete in all relevant particulars and fairly and accurately reflects the missing testimony. As will be more fully explored below, defendants' briefs are fully referenced with over 239 citations to the record, exhibits, and transcript.

It is evident that the Court based its decision upon its misapprehension of the state and condition of the record and of defendants' briefs as is demonstrated by the following quotation from page one of the decision:

> "As a result we have before us briefs of both sides loaded with unreferenced, self-serving statements of facts and contentions, with an apparent invitation that we perform their procedural obligations and conduct their research. We cannot indulge them such luxury under the circumstances here. This Court, therefore, under elementary principles anent appellate review, in this particular case will presume the findings of the Court to have been supported by admissible, competent, substantial evidence."

As pointed out on page 4 of defendants' reply brief, the missing portions of the oral testimony are insignificant when compared with the voluminous amount of testimony actually brought before the Court. The only testimony not before the Court is the direct examination of J. R. Bagnall, (every point covered in direct was carefully re-examined on cross); the direct of Don V. Tibbs (as with J. R. Bagnall's direct, every point covered on direct

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was re-covered in detail on cross); the testimony of LeLand Peterson (who testified that he had not been an officer of Suburbia Land); the testimony of John Brown (who testified as to the appraised value of the ranch); and some of the cross of Reed Maxfield (the Court does have 68 pages of Maxfield's cross). Except for the testimony of LeLand Peterson which may have some bearing upon the credibility of Mr. Maxfield, none of the omitted testimony has anything to add to that actually before the Court, and counsel has repeatedly stated, and herein re-states, that the testimony as designated, and particularly as actually before the Court accurately depicts the testimony of the participants at the trial. How can the Court state that only part of the testimony favorable to the defendants is before the Court, or that much of the testimony before the Court is controverted by the missing portions, without reading what is actually before them.

In the recent case of Nagle vs. Club Fontainbleu, 17 U. 2d. 125, 405 P. 2d. 346 (1965), the court made the following observation:

> "Only a partial transcript of the trial, containing exerpts from the testimony has been brought here. Upon reading it we perceive therein nothing which would compel a determination contrary to that made by the trial court."

The appellants Suburbia and Romereo maintain that the testimony before the Court will compel a determination contrary to that made by the trial court, and earnestly beg the Court to give due consideration to the arguments contained in their briefs and the carefully review the evidence cited in support thereof. If the Court does not do so, the effect of its ruling in this case can only be to negate Rule 75 (e), and all appeals must, from this time foreward include the entire record, thereby vastly increasing the expense to the litigants and adding to the workload of this Court.

POINT II

THE COURT ERRED IN CONCLUDING THAT THE DEFENDANTS'

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BRIEFS WERE LOADED WITH UNREFERENCED, SELF-SERVING STATEMENTS OF FACTS AND CONTENTIONS AND THAT DEFENDANTS EXPECTED THE COURT TO CONDUCT THEIR RESEARCH.

The undersigned writer is undoubtedly responsible for leading the Court into error in this regard. The statement of facts as contained in appellants' original appeal brief was admittedly not very well referenced. Counsel can only say that his attempt to set forth the facts was straight foreward and he assumed that the statement as prepared would be accepted by plaintiffs. If so, it would have been, in essence, an abstract of much of the testimony as contemplated by the rules. Even so, defendants' appeal brief contains at least 100 citations to the record, exhibits, and testimony. Most of them are admittedly contained in the arguments rather than in the statement of facts.

When, however, plaintiffs challenged defendants' version of the facts, the defendants reprinted that statement as an appendix to their reply brief. Every fact was referenced by appropriate citation to the record, exhibits, or oral testimony. That restatement alone contains at least 87 references, with an additional 52 included in the arguments. Between the appeal brief and the reply brief, defendants have made over 239 references to the appropriate exhibits, records, and testimony. Counsel represents to the Court that over 100 man hours were spent developing those citations alone. With such ample references, counsel cannot understnad how the Court can make the assertion that defendants' brief is loaded with self-serving and unreferenced statements of facts and contentions. Counsel asks the Court to reconsider its finding in this regard and to give defendants' briefs and arguments the due consideration counsel believes they deserve.

POINT III

THE COURT ERRED IN FAILING TO RESPOND TO THE FIRST SIX POINTS RAISED BY DEFENDANTS WHICH POINTS ARE BASICALLY POINTS OF LAW AS APPLIED TO UNCONTROVERTED MATTERS OF FACT.

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1. Point 1 of the appellants appeal brief lists 10 major defects in the title to the land the sellers were supposed to deliver to the buyers. Those defects consisted of the following:

(a) Encroachment of the railroad right of way.

(b) Encroachment of the county road.

(c) Loss of 1/2 interest in 140.15 acres, containing the bulk of the improvements.

(d) Loss of the fee simple interest in .57 acres containing the main residence.

(e) Property in the name of seller's son J. A. Bagnall.

(f) Private easements.

(g) Unreleased lis pendens.

(h) 1.5 acres in the name of strangers Sharp and Hansen.

(i) Outstanding oil and gas leases.

(j) Failure to deposit water stock into escrow within the time allowed by the contract, or at any time prior to the notice of default and commencement of suit.

In addition, sellers did not tender the abstract to the buyers at any time, although required to complete the abstract by the terms of the modification agreement. Except for the matter of the private easement, all of the foregoing defects are uncontroverted. In defense thereto, plaintiffs assert that buyers represented that they had acquired all of the interest of the parties. (See their brief, page 18). The Supreme Court in rendering its decision herein, apparently assumed that to be the fact. On page 2 of the decision, the Court states that Suburbia's agent represented that it had acquired Jean B. Nyber's individually claimed and acquired one-half interest in the 140.15 acre tract. Even if it were to be conceded that the buyers had made such a representation and that it would

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be controlling in the face of the representations to the contrary contained in the modification agreement, and the warranties to the contrary contained in the warranty deed on file with the escrow, the Court must still contend with the other 10 defects listed above, all of them being substantial and material.

As pointed out on page 15 of defendants' appeal brief, 57-1-3, Utah Code Annotated, 1953, states:

> "A fee simple title is presumed to be intended to pass by a conveyance of real estate unless it appears from the conveyance that a lesser estate was intended."

Bagnall's attempt to vary the meaning of their warranty deed, and to vary the plain meaning of the modification agreement by parol should not be allowed. In the case of Van Cott vs. Jacklin, 226 P. 460 (Utah 1924) the Court found that the warranties controlled even where the buyer knew that the vendor did not own all of the ground conveyed.

In the case of Leavitt vs. Blohn, (1960), 11 Utah 2d. 220, 357 P. 2d. 190, discussed at some length in defendants' appeal brief, page 15 and 17, the Court had occassion to determine the effect of the vendor's failure to perfect his title before attempting to default the purchaser. The Court stated that the obligations in an installment land contract runs both ways and that the buyer could not enforce his rights if he failed to make his payments. "By the same token, if the seller fails to meet his commitment he likewise cannot expect the buyer to perform." The Idaho Court in the case of Sorensen vs. Larue (1927), 252 P. 494, stated that the vendor must furnish good title as of the date required by the contract, and failing to do so, even though the buyer was admittedly unable to make the payments, the vendor could not default the vendee and bring suit for foreclosure. He had to tender performance as required by the contract before he could default the vendee. And finally, in the case of Roberts vs. Braffett (Utah 1907), 22 Utah 51, 92 P. 789, the Court held that:

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> "Where time is of the essence of a contract of sale of real estate, but neither party exercised his right to declare an end to the contract, the vendor cannot, when the stipulations of the contract are mutual, dependent, and concurrent, legally placed the other party in default until he himself had tendered performance by tendered performance by tender of a deed, and accounting for the purchase money."

2. Point II of appellants' brief makes two approaches to the matter of the tender by defendants of all delinquencies. The first is simply a matter of the application of the law to uncontested facts. Prior to the notice of default, Reed R. Maxfield on behalf of Suburbia Land Company, made a tender "of any and all amounts that are due J. R. Bagnall under the terms of that certain real estate contract dated September 1, 1962." (Exhibit P-15) This tender was rejected (Exhibits P-16, P-18), and the full accelerated balance demanded (Exhibit P-18). Again, on August 28, 1970, within the 30 days provided for in the notice of default, tender was again made of "all amounts actually due" under the contract, (Exhibit P-32). None of the tenders, including the one of August 28, were accepted. (See pre-trial stipulation number 15) The appellants have argued at some length on pages 23 to 31 of their appeal brief, that the tenders were good as a matter of law, and they feel that the Court should respond to that arguement and give them the reasons for any decision made thereon. Even if no transcript at all had been designated, this argument would still have to be decided by the Court.

Beginning on page 31 and continuing through page 35 of their appeal brief, appellants second approach points out the reasons why the testimony and weight of the evidence compel a finding that the tenders were good as a matter of fact as well as a matter of law. Some of the more pertinent facts to be considered by the Court are as follows:

(a) July 5, 1969, tender (Exhibit P-15) rejected by the Bagnalls.

(b) Maxfield had over $15,000.00 cash on hand to meet the tenders

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as of July 5, 1969 (T-330, 331), and the Clearfield State Bank had committed to loan an additional $15,000.00 (Transcript book 1, p 232).

(c) Buyer's net worth of $100,000.00 (Tr. bk. 3, P. 49)

(d) Lester Ralph Romero had assets to back up the tender, was the owner of a going business concern in Salt Lake City, and had on deposit, as of October 23, 1969, a thrift certificate at Interlake Thrift for $10,000.00. (Tr. 365, Exhibit D-46).

(e) August 28, 1970, buyers again tendered payment (Exhibit P-31). Again vendors did not accept.

(f) Romero had on deposit with Interlake Thrift, as of October 26, 1971, a thrift certificate for an additional $9,000.00. (exhibit D-47).

(g) September 27, 1972, defendants made a proffer of proof consisting of $80,000.00 worth of certificates in the name of Romero antidating the tenders of July 5, 1969, and of August 28, 1970. (See Judge Erickson's Order of October 11, 1972).

Defendants position on the weight of the evidence is amply supported by the testimony and exhibits before the Court. Hundreds of citations are given to the record, transcript and exhibits which will sustain defendants position.

3. Point III of the trial brief is again mostly a matter of the application of the law to uncontested facts. Defendants contend that the plaintiffs waived tender by refusing to give defendants an accounting, by rejecting their written tenders, and by demanding the entire contract balance rather than just the delinquencies. Again, the record and the exhibits would seem to be sufficient to decide this matter without the necessity of recourse to any oral testimony. As is pointed out in detail on pages 35 through 40 of the appeal brief, written tenders were made by the vendees, and written rejections received from the vendors' lawyers, and written demand made by the vendors for the entire accelerated

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balance due under the contract. They, of course, had no right to accelerate since there was no acceleration clause in the agreements.

Recourse to the transcript of oral testimony, however, strengthens the conclusion that Bagnalls had waived tender, and that, consequently, Suburbia had no obligation to make a tender in any event. Maxfield, J. R. Bagnall, and Florence Bagnall all testified that within a few days of July 5, 1969, the Bagnalls, upon advice of counsel, determined that they would not take anything less than the improperly accelerated contract balance. (Tr. 108, 109, 166, and 299) Maxfield and J. R. Bagnall both testified that Mrs. Bagnall told Maxfield that they did not want the money, they wanted the land back. Defendants believe that the Court should have considered the legal and factual elements of their point III and ruled specifically thereon.

4. Point IV is a straightforeward legal arugment going only to the question of the validity of the notice of default which admittedly asked for more than twice the alleged default. The Supreme Court in another case, has already ruled on that specific issue and found that such a notice, demanding more than was due, was defective and insufficient to effect a default under the contract. (See the case of Wayne E. Carroll vs. Phil M. Birdsoll (1970), 24 U. 2d. 411, 472 P. 2d. 389.) In that case the notice demanded the alleged default, demanded $475.00 attorney fees, and demanded an increased monthly payment in the future over and above the contracted payment. The Court stated that the notice obviously required the vendees to do more than could be required of them under the contract and made the following observation and ruling:

> "It is equally obvious that such a notice could not possibly convert buyers into tenants at will, since it required the buyers to do more than that for which the contract called, including unascertained costs and pre-determined attorney's fees before suit."

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The Bagnall notice likewise required the buyers to do something other

than in accordance with the terms of the contract, namely to pay the accelerated balance. And, similarly to Carrol vs. Birdsall, Bagnall demanded unspecified interest. It is equally obvious that Bagnalls' notice could not possibly put the defendants into defualt, or as stated by the Carrol vs. Birdsall court, "convert buyers into tenants at will." On this point of law alone, the judgment against defendants should be reversed and the plaintiffs' complaint dismissed.

5. Like many of the other arguments of defendants which were overlooked by the Court, point five as contained in the appeal brief is, again, a matter of law to be applied to basically undisputed facts. As is acknowledged by all parties, a payment of $400.00 was made by the defendants to the escrow on December 1, 1971, which payment was regularly posted to interest, the escrow fees deducted, and the balance forewarded to Bagnalls. (Exhibit D-18). Plaintiffs refused the monies and returned them to the bank where they were deposited to a checking account opened by Bagnall (Exhibit P-27). The legal affect of that payment, the relationship of the bank as agent of either or both parties, its responsibilities and their effect upon the parties, etc., are all discussed at length in defendants' appeal brief on pages 47 through 53. These arguments do not depend, for the most part, upon any oral testimony, and are therefore subject to determination by the Court without resort to the transcript of oral testimony. To the extent that such testimony and exhibits are examined, however, the Court is led inexorably to the conclusion that the bank was the agent of Bagnall only, and that its acceptance of the payment for Bagnall was binding upon Bagnall and therefore reinstated the contract.

6. Point six explores the legal effect of the offer to pay the entire contract balance into the registry of the Court, and the effect of the independant escrow set up by the defendants to back up the offer. Again, this is

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a matter of law, and does not involve any disputed facts. It should, therefore, be decided by the Court regardless of the alleged state of the record.

POINT IV

THE COURT ERRED IN FAILING TO RESPOND TO THE SEVENTH POINT RAISED BY THE DEFENDANTS WHICH POINT WAS A QUESTION OF PROCEDURE AND HAD VERY LITTLE IF ANYTHING TO DO WITH ANYTHING CONTAINED IN THE TRIAL TESTIMONY.

Point seven, set forth on pages 59 and 60 of the appeal brief discusses a point of procedural error by the trial judge. As pointed out in the brief, the pre-trial order and some of the determinations contained therein stand in direct contradiction to the findings of fact ultimately entered by the Court. Defendants make the point that the pre-trial order should have been amended rather than ignored. This is a matter of law and could be ruled upon by the Supreme Court on the basis of the order and the findings, without access to any other part of the record.

POINT V

APPELLANTS ARE CONSTITUTIONALLY ENTITLED TO A WRITTEN DECISION RESOLVING EACH OF THE POINTS RAISED IN THEIR APPEAL BRIEF STATING THE REASONS FOR THAT DECISION.

The opinion of the Supreme Court fails to consider the points raised by the defendants in the original or reply brief, except for the supposed lack of citation to the record, and the problems surrounding the 140.15 acres of Jean Nyberg which was deeded to Utah Valley Land and ultimately to United Paint and Colors, and then bases its entire decision upon its misapprehension of these two facts. The Supreme Court simply ignores defendants contentions that (a) the plaintiffs' prior defaults prevent them from defaulting the defendants; (b) that parol evidence should not be allowed to alter the effect of the warranties in the warranty deed nor to alter the provision in the modification agreement to the effect that plaintiffs would clear up any "defects" in the title within 18 months; (c) that

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defendants' tenders of the delinquencies are valid under the statute without proof of ability to pay where, as here, the vendors rejected the tender and advised the vendee that they would not accept anything less than the total contract balance; (d) that vendors waived tender by their action in refusing anything less than the total contract balance and by advising defendants that they did not want the money in any event, that what they really wanted was the land back; (e) that plaintiffs' notice of default was fatally ambiguious and that the defendants could not determine therefrom what was required of them to avoid default, or; (f) that the notice was defective because it demanded performance other than that required by the contract; (g) that by accepting money on the contract after notice of default the contract was reinstated; (h) that the escrow was the agent for sellers only; (i) that the defendants proffer of $80,000.00 worth of savings certificates antedating the tenders compelled a finding for the defendants; (j) that the defendants offer to pay the entire contract balance into the registry of the Court reinstated the contract; (k) that the trial Court should have amended the pre-trial order rather than to simply ignore it.

Rule 76 (a), Utah Rules of Civil Procedure, reads in part as follows: "...every decision of the court, together with the reasons therefore concisely stated, shall be given in writing..." Article VIII, Section 25, of the Constitution of the State of Utah reads in part as follows: "When a judgment or decree is reversed, modified or affirmed by the Supreme Court, the reasons therefore shall be stated concisely in writing..."

This case is a matter of great importance to all of the parties involved, and involves a very valuable piece of real estate. Defendants believe that a careful consideration of the points raised in their briefs will compel an order reversing the trial courts findings and dismissing the plaintiffs' complaint. Defendants briefs, particularly when read together are replete with citation to

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the transcript, exhibits, and the record, and clearly set forth the legal and factual matters to be determined by the Court.

Defendants are constitutionally entitled to a decision of the Court responding to each of the issues raised by the defendants. The writer also sincerely believes that the legal issues raised by the defendants are ripe for determination by this Court as precedent for later similar disputes. A more detailed decision which considers the various legal issues raised by the defendants is clearly appropriate and justifies rehearing of this matter.

CONCLUSION

To justify rehearing or modification of a decision of the Supreme Court a strong case must be made that the Court has seriously erred, and that the error materially affects the result. (Cummings vs. Nielson, 42 Utah 157, 129 P. 619.) Matters justifying rehearing or modification of a decision include situations where the Court has (a) misconstrued or overlooked some material fact, (b) has overlooked some statute or decision, (c) has based the decision on some wrong principle of law, (d) has misapplied or overlooked something which materially affects the results, (e) has failed to correctly state the law, etc. (Beaver County vs Home Indemnity Co., 88 Utah 1, 52 P. 2d. 435. Cummings vs. Nielson supra). The Court seriously erred in numerous areas and in numerous manners which matterially affected the result of this case, as follows:

1. The Court concluded, apparently without reading the record or defendants briefs, that the defendants had designated only those portions of the record favorable to themselves and that much that was designated was controverted by the undesignated portions. As discussed in detail above, the conclusion is not justified.

2. The Court erred in concluding that it should affirm the decision of

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the trial court unless the entire record is before it. At this point the writer wishes merely to restate the correct proposition that even with only a partial transcript the Court must reverse if there is evidence before it which will compell reversal. Such compelling evidence has been pointed out by counsel and discussed at great length in the appeal and reply briefs.

3. The Court erred in its finding that the defendants' briefs were loaded with unreferenced and self-serving statements of facts and contentions. With 239 citations to the transcript, exhibits, and record, it can hardly be said that defendants' briefs were unreferenced.

4. The Court erred in failing to respond to defendants' contention that the substantial and material prior defaults of the plaintiffs prevented them from defaulting the defendants.

5. The Court erred in failing to find that parol evidence should not be allowed to alter the meaning and effect of the unambiguous warranty deed, real estate agreement, and modification agreement.

6. The Court erred in failing to rule upon defendants' contention that the written tenders of all amounts due under the contract, coming before notice of default, are valid as a matter of law, especially where, as here, plaintiffs rejected the tenders, and told defendants that they would not accept anything less than the total contract balance, and that they did not want the money, they wanted the land back.

7. The Court erred by failing to rule upon defendants' contention that the notice of default was fatally ambiguous and that it was otherwise defective because it demanded more than was due under the contract.

8. The Court erred by failing to respond to the defendants' contention that the escrow was the agent of the plaintiffs only.

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9. The Court erred by failing to determine the defendants' claim that the payment of $400.00 to the escrow after the notice of default, and the acceptance thereof by the escrow constituted a waiver of the notice and reinstated the contract.

10. The Court erred in failing to consider the effect of defendants' proffer of $80,000.00 worth of savings certificates, or to consider the defendants' offer to pay the entire amount due on the contract, together with fees and costs, into the registry of the Court.

11. That the pre-trial order should have been followed or amended, rather than merely ignored is another contention of the defendants. The Court's failure to address itself to that proposition also constitutes error.

The writer apologizes to the Court for the length and complexity of this brief, as well as the earlier ones. In an attempt to reduce the size hereof, many references to the record which would otherwise be appropriate have been omitted. All such required references are included in the appeal and reply briefs on file however. Defendants, through their counsel, also request the court to grant them the opportunity for oral argument on this motion for rehearing.

Respectfully submitted,

ROBERT L. LORD
118 Metro Building
Salt Lake City, Utah 84111
Attorney for Defendant-Appellants

I hereby certify that I mailed two copies of the foregoing, postage prepaid, this 26th day of December, 1975, to Jackson Howard, for Howard Lewis & Peterson, attorneys for the plaintiff-respondents, 120 East 300 North, Provo, Utah, 84601.

Robert L. Lord

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